In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1001

AUTHER LARNCE KING AND JAMES ALBERT KING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1969. On November 28, 1969, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including

December 27, 1969. The petition was filed on December 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing that a person's presence at an unregistered distillery in operation, unless explained to the jury's satisfaction, was a circumstance from which the jury might infer that such person was carrying on the business of a distiller without having given the bond required by law.

2. Whether the trial court erred in giving "Allen charge" instructions in both its original and supplemental charges.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioners were convicted of conspiracy to violate various liquor laws (Count 1); carrying on the business of a distiller without giving bond, in violation of 26 U.S.C. 5601(a)(4) (Count 3); and fermenting mash fit for distillation, in violation of 26 U.S.C. 5601(a)(7) (Count 4) (R. 465-468, 496, 497).[1] On July 25, 1968, the court imposed concurrent sentences of imprisonment for three years upon Auther Larnce King, and for four years upon James Albert King (R.

[1] Both petitioners were found not guilty on Count 2, charging possession of an unregistered still in violation of 26 U.S.C. 5601(a)(1) (R. 467-468, 496, 497).

499, 500). On appeal the convictions were summarily affirmed.

Over defense objection (R. 396-398, 431-432), the trial court gave the following instructions as part of its final charge (R. 426-427):

> Now, with respect to count three, charging a violation of Section 5601(a)(4), Title 26, United States Code that I have read to you, the presence of one or more persons at or near an unlawful unregistered distillery in operation at a time when the business of the distiller is being carried on or engaged in, unless explained to your satisfaction, is a circumstance from which you the jury may infer that such person or persons present were carrying on the business of a distiller without having given the bond required by law. You are not required to draw that inference or conclusion but you are justified by their presence near an unregistered distillery which is in operation at the time, unless explained to your satisfaction, or you are authorized in concluding or it would be a circumstance from which you may infer that such a person or persons so present were carrying on the business of a distiller without having given bond. Likewise, with respect to the count involving Section 5601(a)(4), where it is shown that a defendant or defendants are near or at the site or place where at the time when the business of a distiller or a rectifier was so engaged in or was carried on, the presence of any such defendant at such site under those conditions, unless explained to your satisfaction would authorize an inference that they were so engaged. This does not mean of course that the presence of a defendant at the site or place of

> an unregistered distillery which was in operation at the time, the business of a distiller being carried on, requires you to convict a defendant or any of them, it simply means that that would be a circumstance which if you see fit would be justified in basing a conviction.

Similarly over defense objection that they were coercive (R. 432-433), the trial court also gave the following instructions as part of its final charge (R. 430):

> It is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement if you can do this without violence to the individual judgment that you have about the evidence. Each one of you has to decide this case for yourself but you should do so only after an impartial consideration of all the evidence with your fellow jurors.
>
> In the course of your deliberations you should not hesitate to reexamine your own views and to change your opinion if you become convinced that it is erroneous but you should not surrender your honest judgment as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors or for the sole purpose of bringing in a verdict.

After the case had been submitted to the jury at 4:53 p.m., the jury foreman returned at 6:25 p.m. to inquire as to what the jurors should do if they failed to agree on particular counts (R. 447-448). Then the court, over defense objection that it was again coercive (R. 450), gave the following supplementary charge (R. 448-449):

> In response to that I would like to give the jury this additional instruction, that the court believes and is informed and is instructed that in a large percentage of cases absolute certainty cannot be expected and, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet you should examine the questions submitted with candor and with proper regard and deference to the opinions of each other.
>
> It is your duty to decide this case on all counts if you can conscientiously do so. No juror is expected to do violence to his conscience. You should listen with the disposition to be convinced of each other's arguments. If a much larger number are for conviction a dissenting juror should consider whether his doubt is a reasonable one which made no impression upon the minds of many men equally honest and equally intelligent with himself. If, on the other hand, a majority of you are for acquittal the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

The jury returned its verdict of guilty on three of the four counts (see *supra*, p. 2) at 6:35 p.m. (R. 451).

ARGUMENT

1. Petitioners contend that the trial court erred in instructing the jury that a person's presence at an unregistered distillery in operation, unless explained to the jury's satisfaction, was a circumstance from

which the jury might infer that that individual was carrying on the business of a distiller without having given the bond required by law (Pet. 7-8). This instruction, however, was correctly given under this Court's decision in *United States* v. *Gainey*, 380 U.S. 63. It did not, moreover, constitute comment on the failure of petitioner Auther Larnce King to take the stand. Rather, it properly made clear that the jury was not required to convict under Count 3, charging the carrying on the business of a distillery without giving bond in violation of 26 U.S.C. 5601(a)(4), by reason of the petitioner's mere presence at the still, but that the jury could consider such presence, if unexplained, as a circumstance which might justify conviction.

In *United States* v. *Romano*, 382 U.S. 136, on which petitioner relies, the Court held invalid the statutory inference in 26 U.S.C. 5601(b)(1) relating to Section 5601(a)(1), which proscribes *possession* of an unregistered still—a statute different from Section 5601(a)(4), which prohibits the carrying on of the business of a distiller without giving bond. In the instant case, no instruction relating to the statutory inference in Section 5601(b)(1) was given, and *Romano* was thus complied with. In any event, the jury found petitioners not guilty on Count 2, charging possession of an unregistered still. There is no conflict of decisions.

2. There is no basis for petitioners' claim that the trial court erred in giving "Allen charge" instructions (based upon those approved in *Allen* v. *United States*, 164 U.S. 492) in both its original and supple-

mental charges (Pet. 8-9). The instructions given did not improperly compel the jury to reach a verdict of guilty or not guilty. Although the instructions directed the jurors to consider the viewpoints of other jurors and not to hesitate to examine their own opinions, they also made clear that the jurors should not surrender their conscientious judgments merely for the sake of reaching some verdict. The instructions here were in no way coercive. While some circuits have decided that henceforth the Allen charge should be modified,[2] no federal court that has considered the question has held that the mere giving of an Allen charge is *per se* reversible error. See *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2) certiorari denied, 396 U.S. 835; *Fulwood* v. *United States*, 369 F.2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934. There is no occasion for an exercise of this Court's supervisory power over the federal cours.

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[2] *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), pending on petition for a writ of certiorari, No. 551 Misc., this Term.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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